No. 71-15

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD D. KLEINDIENST, ACTING ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANTS

v.

ERNEST MANDEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. There is no dispute that Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28)(D) and (G)(v), renders Mandel and all other aliens who advocate the doctrines of world communism ineligible for entry into the United States. Until appellees filed their brief in this Court, however, there had been a dispute about whether that statute was constitutional. The district court, agreeing with appellees' argu-

ments to it, held that Section 212(a)(28)(D) and (G)(v) violated the First Amendment because, in view of appellees' freedom of speech, the "Government is without any power to act in the area defined by (a)(28) * * *" (J. App. 26a). In our main brief, we argued that the district court erred in so holding. But now appellees have virtually conceded the constitutionality of that Section.

They now say that if Congress had enacted a "blanket exclusion" of all aliens in the class described by Section 212(a)(28)(D) and (G)(v), this would be valid under the First Amendment. (Brief for Appellees, p. 16.)[1] But Section 212(a)(28) is a "blanket exclusion" in any meaningful sense of the phrase:[2] the statute states that *all* aliens who advocate world communism "shall be ineligible to receive visas and shall be excluded from admission into the United States."[3] Appellees also say that when Congress bars the entry of all aliens within a particular class there is "no need of a specific justification for the exclusion of each member of the class" (Brief for Appellees, p. 28). It follows

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[1] See also *id.* at pp. 13, 26, 28.

[2] Indeed, appellees themselves stated in their Memorandum before the district court in support of their motion for a preliminary injunction, that the statute "establishes an absolute ban against admission into the United States of 'Communist' and other aliens having proscribed beliefs or affiliations" (Memorandum, at p. 24).

[3] There are exceptions for diplomatic officers and representatives of foreign governments, as we pointed out in our main Brief, p. 18.

that neither Mandel nor appellees can complain that Section 212(a)(28) renders Mandel ineligible for admission and we so argued in our main brief before this Court.

Appellees shift the focus of their attack on the statute to the fact that the Attorney General has discretion under Section 212(d)(3) to waive an alien's inadmissibility. Apparently the argument is that although Congress can constitutionally bar all aliens of a certain class and although a general justification is sufficient when a particular alien within the class is thereby rendered ineligible for admission, the failure of the Attorney General to approve the Secretary of State's recommendation to admit the alien temporarily despite his inadmissibility may deprive people in this country of freedom of speech.[4]

But if, as we have argued, people here have no First Amendment right to compel the admission of an alien Congress has barred from entry, people here similarly have no First Amendment right to compel

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[4] Appellees are mistaken in asserting that the figures cited at page 18 n. 24 of our brief show that "the vast majority of aliens classified under § 212(a)(28), who apply for waivers, are admitted" (Brief for Appellees, at p. 27). They repeat this assertion several other times in their brief (*id.* at pp. 13, 31, 32).

Under Section 212(d)(3) the Attorney General cannot waive exclusion except upon approval of a recommendation of the Secretary of State or the consular officer. The figures cited in our brief represent the number of such recommendations approved and not approved. The Immigration and Naturalization Service and the Department of State have not compiled figures regarding the number of times such a recommendation is refused by the Secretary or the consular officers.

the Attorney General to allow the admission of such an alien. The fact that Congress permitted exclusion to be waived in the discretion of the Attorney General and required a detailed report whenever this is done[5] may benefit aliens seeking entry but it certainly gives appellees no greater constitutional rights. Congress itself can, and does, pass private bills to allow the admission of aliens who would otherwise be barred from entry,[6] but surely this does not mean that the First Amendment rights of people in this country may be violated when a private bill fails to pass. With respect to the First Amendment, the matter is no different when Congress delegates authority to the Executive by enacting a general waiver provision such as Section 212(d)(3), which applies to twenty-nine different categories of aliens who are ineligible for entry.

The precise holding of the court below in this case must be borne in mind. The district court found Section 212(a)(28)—the general exclusion provision—unconstitutional because it violated appellees' freedom of speech under the First Amendment (J. App. 10a-26a). The court then held that since Congress could not constitutionally exclude aliens under Section 212(a)(28), the waiver provision of Section 212(d)(3) must also fall with respect to aliens within Section 212(a)(28) because such aliens *must* be admitted, at least on a temporary basis, and

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[5] 8 U.S.C. 1182(d)(3) and (6).

[6] See our main brief, at p. 39 n. 55.

the Attorney General therefore has no discretion to exercise. See J. App. 26a-28a.

Rather than supporting the reasoning of the district court, appellees now assert that Congress in Section 212(d)(3) intended to require the Attorney General to waive exclusion in this case because it would be in the "public interest" (Brief for Appellees, pp. 27-33).[7] This statutory claim was neither raised in the court below[8] nor considered by it[9] and we do not believe it is properly before this Court. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, and cases there cited. If the Court concludes that the statutory claim now raised for the first time by appellees is open, this issue should be dealt with in the first instance by the district court. Since the district court decided this case on appellees' motion for a preliminary injunction and

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[7] Presumably appellees also think that the Attorney General's refusal to waive Mandel's exclusion was not in the "public interest." But see p. 8 and note 14 *infra*.

[8] Indeed the district court viewed Section 212(d)(3) as giving unlimited discretion to the Attorney General to decide whether to waive an alien's inadmissibility, although the court said this was "irrelevant" since Congress itself could not exclude aliens within the class described in Section 212(a)(28). (J. App. 25a-26a.)

If appellees had raised this statutory claim below, the district court would presumably have dealt with it before reaching the question whether Section 212(a)(28) is constitutional.

[9] Nor did appellees raise this claim in their Motion to Affirm in this Court. See also Rule 15(1)(c) of the Rules of this Court.

did not pass on the other claims that were raised below,[10] including Mandel's contention that the Attorney General abused his discretion, these claims, if still available, also should be decided first by the district court.

In any event, appellees' statutory claim does not, we submit, support the district court's judgment compelling the government to admit Mandel.[11] Section 212(d)(3), which is derived from the Act of 1917,[12] confers upon the Attorney General discretionary authority to lift the ban Congress has imposed with respect to aliens such as Mandel seeking temporary entry. Congress included this provision in the Immigration and Naturalization Act of 1952 because it recognized that with respect to the numerous categories of excludable aliens under Section 212(a) there may be cases "where there are extenuating circumstances which justify the temporary admission of otherwise inadmissible aliens, both for humane reasons and for reasons of public interest." H. Rep. No. 1365, 82d Cong., 2d Sess., at p. 51 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess., at p. 12 (1952).

Congress, of course, could have retained sole authority to lift restrictions by the passage of private bills. Instead, it chose to confer this authority on

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[10] See our main Brief, at p. 9 n. 6, and p. 14 n. 10.

[11] Indeed the sweep of appellees' argument extends to refusals by consular officers or the Secretary of State to recommend waiver, as well as to the Attorney General's refusal to approve such a recommendation. See note 4 *supra*.

[12] Act of February 5, 1917, § 3, 39 Stat. 874, 878.

the Attorney General, to be exercised in his discretion. Still, waiver of exclusion is a matter of grace [13] since the alien has no right to enter. And, as this Court held in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543, "[t]he action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." Like suspension of an otherwise valid deportation order, waiver of exclusion is not given as a matter of right, "but, by congressional direction, it is dispensed according to the unfettered discretion of the Attorney General." *Jay* v. *Boyd*, 351 U.S. 345, 357-358; *Kimm* v. *Rosenberg*, 363 U.S. 405, 408. See also Section 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. 701(a)(2), which excludes from the judicial review procedures of the Act "agency action * * * committed to agency discretion by law"; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410.

Thus, whether Mandel should be permitted to enter despite his inadmissibility is a matter Congress left to the discretion of the Attorney General.

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[13] See *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77, where Mr. Justice Harlan stated for the Court that suspension of deportation is a "matter of discretion and of administrative grace." Like suspension of deportation, waiver of exclusion is, we submit, also a matter of administrative grace.

The Attorney General, in making his determination, of course, decides whether a waiver would be in the "public interest," as Congress itself would have done in considering a private bill seeking the same relief. One thing, however, is clear: whether the "public interest" is such that a waiver should be granted is for the Attorney General, not appellees, to decide.

In any event, there is no indication in this case that the Attorney General abused the discretion Congress authorized him to exercise. Mandel was denied entry not because he sought to speak in this country, but because Congress declared aliens in his class ineligible for admission and because the Attorney General refused to waive his ineligibility in light of his violations of the conditions on his previous entry (App. 68).[14] The record here thus discloses a valid basis for the Attorney General's refusal to grant a waiver and Section 212(d)(3) requires no more, as

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[14] Appellees err in asserting throughout their brief that the government has "disavowed reliance on the alleged violation of visa conditions by Dr. Mandel in 1968" (Brief for Appellees, at p. 17 n. 11). Appellees cite nothing to support this assertion for the obvious reason that the government has never made such a disavowal. The most that appears in the record is that the Department of State was of the view that Mandel may not have been fully aware of the conditions on his admission when he departed from his itinerary on his previous visit (App. 43) and that the Attorney General refused to grant Mandel a waiver of inadmissibility because his violations were so flagrant (App. 68).

the district court itself appeared to recognize (J. App. 25a) and as appellees previously agreed.[15]

2. We add one final word. According to appellees, our contention here is "that regardless of whether [our] action violates First Amendment rights of citizens, it is not subject to review by the judiciary" (Brief for Appellees, at p. 33). Of course, we have never said that courts cannot review action of the government that deprives citizens of rights under the First Amendment. Rather, our position is simply that appellees have no First Amendment rights to compel an alien's admission. Our main brief is devoted to that issue and we continue to adhere to our concluding statement that the "First Amendment's guarantee of freedom of speech does not include the power to require the admission of an alien Congress has refused to admit and it does not confer authority on appellees to determine which aliens should enter the country."[16]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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[15] In their complaint, appellees stated that Section 212(d)(3)—"vests unbridled discretion in the ATTORNEY GENERAL" (App. 11). See also appellees' *Memorandum In Support of Plaintiffs' Motion for the Convention of a Three Judge District Court and for a Preliminary Injunction*, at p. 27.

[16] Government's Brief, at p. 39.

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